



The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

### ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability? Specifically, whether claimant's injury to her right hip is included in the injuries suffered from her employment on October 14 and October 26, 1992.
- (2) Whether claimant is entitled to unauthorized medical.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board will first decide the issue of unauthorized medical. Claimant requested unauthorized medical for treatment received in this matter under K.S.A. 1992 Supp. 44-510(c). The Administrative Law Judge opined in regard to unauthorized medical, that both Dr. Roger Hood and Dr. Timothy Stepp would be charging for their depositions on claimant's behalf. He then granted claimant unauthorized medical. K.S.A. 1992 Supp. 44-510(c) provides:

“Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$350.00.”

The language of the statute grants unauthorized medical for the purpose of examination, diagnosis or treatment, not for the purpose of paying for a physician's deposition testimony. As such, the Appeals Board finds Judge Foerschler's Order granting unauthorized medical for the purpose of paying for deposition fees for claimant's medical experts should be reversed.

The Appeals Board must next look to the nature and extent of claimant's injury and/or disability.

Claimant suffered two injuries working for respondent. On October 14, 1992 she injured her back while helping put a patient in bed. The patient became combative, and claimant, in attempting to support the patient, fell down on the bed with him injuring her back.

Later, on October 26, 1992, claimant was struck in the back with a book and that same day was bumped by a co-worker, causing her to strike a wall with her right hip. Claimant acknowledges the injury of October 14 only involved the low back, indicating the injury to the hip occurred as a result of the October 26 date of accident.

It is acknowledged by claimant that she had preexisting problems in both her back and hip. However, the Fund issue is not before the Appeals Board as the respondent and

Workers Compensation Fund have reached a stipulated agreement regarding the Fund's liability in this matter.

Claimant's long-standing hip problems began when she was eleven years old, after having suffered a fall and injuring her left hip. She was diagnosed with femoral epiphysis of the left hip and underwent surgical pinning of the left hip in 1978. She was seen again in 1987 when some hardware from the hip was removed and again in 1990, when additional medical pins were removed. Claimant was examined and treated by several doctors as a result of these injuries. Dr. Fred Rice, a board-certified orthopedic surgeon, examined claimant on several occasions, having originally seen claimant in 1978 when she suffered the first left hip injury at the age of eleven. Dr. Rice felt the claimant's excess weight aggravated her ongoing hip condition, but opined that neither the lifting episode nor the fall episode would have had any effect on claimant's hips. It is significant that, while claimant alleges injury to her right hip, the medical evidence indicates claimant is in need of bilateral hip replacement. Dr. Rice felt claimant would be in need of surgery as a result of her hip deterioration regardless of her work-related injuries.

Claimant was also examined by Dr. Timothy Stepp, a neurosurgeon, on December 4, 1992. Dr. Stepp found prominent degenerative changes of long-standing nature in claimant's hip and back. He recommended claimant undergo a significant weight loss and did not recommend surgery. He did opine claimant had a twenty percent (20%) functional impairment to the back. With regard to any rating or restrictions on the hip he deferred same to claimant's other treating physicians. He testified that normal day-to-day activities would potentially aggravate claimant's ongoing degenerative hip changes regardless of claimant's work activities. He agreed with Dr. Rice that claimant's obesity placed additional stress on her weight-bearing hip joints. This would be an aggravating factor in regard to claimant's ongoing deterioration.

Claimant was examined in January 1994, by Dr. Roger Hood, an orthopedic surgeon. He found claimant to have ongoing degeneration in the hips, resulting from a less than round hip ball in the hip socket. He agreed that excess weight can accelerate the levels of deterioration in these conditions and further agreed that most employment duties would not be an accelerating factor. He did go on to testify that if claimant had jumped out of a second story window, landing on her feet, the shock could have caused additional trauma to the hip, but he did not feel the work-related duties had a significant effect on claimant's ongoing hip deterioration. He felt it significant claimant had only worked at this job for slightly over a month, opining that he did not believe claimant's work duties, even if lasting for a full year, would have made any difference in claimant's deterioration.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which claimant's right depends." K.S.A. 44-501(a).

K.S.A. 44-508(g) states in part:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true, on the basis of the whole record."

Claimant's burden must be carried by a preponderance of the credible evidence. See Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In this instance, the Appeals Board finds the preponderance of the credible evidence does not support claimant's contentions that her injury to her right hip was, in any way, aggravated or intensified by the alleged injury on October 26, 1992. As such, the award of any impairment or disability in this matter would be limited to claimant's low back.

Claimant was examined by Dick Santner, a vocational rehabilitation counsellor with Lindahl, Santner and Longacre, regarding claimant's loss of access to the open labor market and loss of ability to earn comparable wages. In Mr. Santner's report, claimant's restrictions to both her back and hip were combined in reaching his opinion on claimant's loss of access to the open labor market. There is no information in the record which separates the limitations to claimant's low back from the limitations to claimant's hip. It is claimant's burden to prove her entitlement to benefits under the Workers Compensation Act. See K.S.A. 44-501 and K.S.A. 44-508(g). The Appeals Board finds claimant has failed to prove by a preponderance of the credible evidence her entitlement to work disability in this matter, for injuries suffered to her back.

K.S.A. 1992 Supp. 44-510e provides that the extent of permanent partial general disability shall not be less than the percentage of functional impairment. In this instance, the parties have stipulated that claimant had a twenty percent (20%) whole body functional impairment as a result of her back injury. The Appeals Board finds, due to claimant's lack of evidence regarding work disability to the back versus work disability to the hip that claimant is entitled to a twenty percent (20%) whole body functional impairment as a result of injuries to her back and shall be denied compensation as a result of injuries suffered to her hip.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated July 25, 1995, shall be, and is hereby, modified and claimant, Barbara Peeples, shall be, and is granted an award against the respondent, Manor Care, Inc., and its insurance company, National Union Fire Insurance Company, and the Kansas Workers Compensation Fund for a 20% permanent partial general body disability as a result of injuries suffered to her low back on October 14 and October 26, 1992. Claimant is herein denied compensation for alleged injuries suffered to her hip.

Based upon an average weekly wage of \$230.00 claimant is awarded 40 weeks temporary total disability compensation at the rate of \$153.34 per week, totalling \$6,133.22, followed by 375 weeks permanent partial general body disability at the rate of \$30.67 per week, totalling \$11,501.25, for a total award of \$17,634.47.

As of December 21, 1995, claimant would be entitled to 40 weeks temporary total disability compensation at the rate of \$153.34 per week, totalling \$6,133.22, followed thereafter by 124.43 weeks permanent partial general body disability at the rate of \$30.67 per week, totalling \$3,816.27, for a total of \$9,949.49, which is due and owing in one lump sum minus any amounts previously paid. Thereafter, claimant would be entitled to 250.57 weeks permanent partial general disability at the rate of \$30.67 per week, totalling \$7,684.98, to be paid weekly until fully paid or until further order of the Director.

Claimant is denied unauthorized medical.

Fees and expenses of the administration of the Workers Compensation Act are hereby assessed 80% against the respondent and 20% against the Fund per the stipulation of the parties, to be paid as follows:

Hostetler & Associates, Inc.	\$209.85
Richard Kupper & Associates	\$911.40
Metropolitan Court Reporters, Inc.	\$175.60
Jay E. Suddreth & Associates	\$202.30

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1996.

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BOARD MEMBER

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BOARD MEMBER

c: Gerald C. Golden, Kansas City, Kansas  
Mark E. Kolich, Kansas City, Kansas  
Elizabeth Kaplan, Kansas City, Kansas  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director